

DECISION



THE COMPTROLLER GENERAL OF THE UNITED STATES

WASHINGTON, D.C. 20548

FILE: B-212731

DATE: November 28, 1983

MATTER OF: Brod-Dugan Company

DIGEST:

1. Bid offering paint which, according to test data furnished with the bid, did not meet one of the salient characteristics of the brand name paint is nonresponsive and is not eligible for acceptance.
2. A nonresponsive bid may not be corrected after bid opening, since permitting a bidder to do so would be tantamount to allowing the submission of a new bid.
3. Protests alleging improprieties in an IFB apparent prior to bid opening must be filed prior to bid opening in order to be considered.
4. An agency's decision not to resolicit but rather to purchase its requirements from the Federal Supply Schedule is a matter within the agency's judgment which GAO will not question absent a clear showing of abuse of discretion.

Brod-Dugan Company protests the rejection of its bid as nonresponsive under invitation for bids (IFB) No. F11623-83-B-0023 issued by the Department of the Air Force for a requirements contract to fulfill the estimated annual paint supply requirements of Scott Air Force Base, Illinois. Brod-Dugan's bid was rejected because the Air Force found that a paint it proposed to furnish did not meet certain salient characteristics of the brand name or equal specification. Brod-Dugan complains that the rejection was improper because its paint in fact met or exceeded the particular specifications in issue and that it is entitled to receive award of the contract as the low responsive bidder. We deny the protest in part and dismiss it in part.

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The solicitation called for the purchase of approximately 11,000 gallons of paint, in different colors and in widely varying amounts, ranging from 12 quarts of item No. 0041 to 7,000 gallons of item No. 0046. The Air Force issued the solicitation on a brand name or equal basis, with Glidden paints specified as the brand for all 46 paint items. The solicitation also indicated that only one award would be made for all items. In order to be responsive, a bidder not offering Glidden paints had to certify that its product was "equal" to the Glidden product for all items except Nos. 0005 through 0008 and No. 0046. For those particular items, however, the bidder had to furnish a certified report from an independent testing laboratory to the effect that its product had been tested against the Glidden product and had been found to meet or exceed the salient characteristics of the Glidden paint listed in the specification.

The particular paint item at issue in this protest is the 7,000 gallon requirement for item 0046, identified on the IFB's Schedule of Supplies as:

"Semi-Gloss Enamel, Pre-Tinted Ready To Use,
Color Twine, Glidden #3700 or equal"

The salient characteristics for this item included expressed minimum requirements for coverage, resistance to fade, curing time, retention of sheen, etc. The Air Force had indicated a desired coverage of 400 square feet per gallon (sq. ft./gal.), but allowed as a minimum acceptable coverage 340 sq. ft./gal. for paint applied by brush or roller and 240 sq. ft./gal. for paint applied by conventional spray gun.

Brod-Dugan offered its pure white "One Coat Semi-Gloss Latex Enamel" as an "equal" product for item 0046, and had it tested against the Glidden series #3700 paint as required by the IFB. The Brod-Dugan paint met or exceeded all characteristics except coverage:

	<u>Brod-Dugan</u>	<u>Glidden</u>
Brush	317 sq. ft./gal.	350 sq. ft./gal.
Spray	230 sq. ft./gal.	240 sq. ft./gal.

Because the test report submitted with its bid showed that Brod-Dugan's offer on item 0046 did not meet the coverage specification, the firm's bid was rejected as nonresponsive. Glidden received award as the low responsive bidder.

After Brod-Dugan's initial protest to the agency, the Air Force began to question its coverage specifications when none of the offerors was able to attain the desired goal of 400 sq. ft./gal. Because the Air Force now felt that the theoretical coverage goal was impossible to obtain, it concluded that either the solicitation should be canceled or that award should be made to Glidden, the only responsive bidder under the original IFB. The contracting officer elected to award the contract to Glidden.

On the same date as award, Brod-Dugan submitted a new test result which showed that its product, when matched exactly in tone to the Glidden product, exceeded the coverage specification. Brod-Dugan asserted that the specification for item 0046 had required a pure white paint, and that the Glidden paint was slightly toned to an off-white. When Brod-Dugan toned its paint accordingly, the test results changed as follows:

	Brod-Dugan (toned)	Glidden
Brush	364 sq. ft./gal.	350 sq. ft./gal.
Spray	247 sq. ft./gal.	240 sq. ft./gal.

Although this new test result was submitted well after bid opening, Brod-Dugan maintained that its bid was responsive, and that its offer on item 0046, significantly lower than Glidden's to begin with, would be even more cost-effective as the result of the toning.

Brod-Dugan asserts that its bid was unfairly rejected as nonresponsive because its product, when toned to match the Glidden paint, clearly exceeded the Air Force's coverage specifications. The firm also asserts that its total price, initially more than \$11,000 lower than Glidden's bid, will now be even lower as the result of toning the large item 0046 requirement, and accordingly demands award of the contract.

Contrary to Brod-Dugan's assertion that the specifications called for a pure white paint for item 0046, the IFB, as indicated earlier, clearly stated that the Glidden paint was tinted to a "Twine" or off-white tone. We see nothing in that description which would have misled a bidder into believing that the Air Force required a pure white paint for item 0046. The burden was upon Brod-Dugan to make sure that its product was toned to match exactly the Glidden paint prior to being tested; Brod-Dugan's own error resulted in the Air Force's proper rejection of the firm's bid as non-responsive.

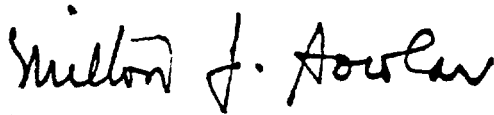
We have consistently held that a bid as submitted must represent an unequivocal offer to provide the product or service in total conformance with the requirements of the IFB. Edw. Kocharian & Company, Inc., 58 Comp. Gen. 214 (1979), 79-1 CPD 20. Because Brod-Dugan's offer on item 0046 did not meet the minimum coverage specifications, it could not be accepted. Although the firm attempted to correct its initial error by subsequently toning its paint and having it retested, it is well-established that a non-responsive bid may not be corrected after bid opening. Permitting a bidder to do so would be tantamount to allowing the submission of a new bid. Parco, A Division of Blue Mountain Products, B-211016, March 28, 1983, 83-1 CPD 318. We therefore find no legal basis upon which Brod-Dugan is entitled to award under the original solicitation.

Although Brod-Dugan's letter of protest indicated its dissatisfaction with the brand name or equal aspect of this procurement, the issue is untimely and will not be considered. Under our Bid Protest Procedures, protests based upon alleged improprieties in an IFB which are apparent prior to bid opening must be filed prior to bid opening. 4 C.F.R. § 21.2(b)(1) (1983). Here, the brand name or equal restriction was apparent to all bidders well before the June 27, 1983 opening date. Brod-Dugan did not object until its August 16 protest to this Office, nor did it refrain from attempting to secure the satisfactory test results which were required for certain items as a material part of the brand name or equal competition. This issue is therefore dismissed.

In any event, the Air Force's actions have rendered Brod-Dugan's protest essentially moot. The Air Force has terminated its contract with Glidden for the convenience of

the government because it perceived that the unrealistic coverage requirements in the IFB rendered the solicitation materially defective and the award erroneous. The Air Force indicates that it will purchase its needs from the Federal Supply Schedule. The Air Force's decision not to resolicit but rather to purchase the paint from the Federal Supply Schedule is a matter within the business judgment of the contracting officer which we will not question absent a clear showing of abuse of discretion. AMRAY, Inc., B-210490, February 7, 1983, 83-1 CPD 135.

The protest is denied in part and dismissed in part.


for Comptroller General
of the United States